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In the

Supreme Court of the United States

OCTOBER TERM, 1951

No. 596

SOUTHWEST STONE COMPANY,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RALPH W. CURRIE,
FRANK A. LEFFINGWELL,
Attorneys for Petitioner.

Date: February 15, 1952.

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	3
Statement	4
Specification of Errors	5
Reasons for Granting the Writ	5
Summary of Facts Held to Be Irrelevant	8
Summary of Facts Admitted in Evidence	9
Conclusion	12
Certificate of Service	13
Appendix A, Applicable Rules	15

Authorities and Cases Cited

Interstate Commerce Act, Section 6 (49 U. S. C. A. 6)	3
Pacific Portland Cement Company v. Western Pacific Railroad, 184 F. 2d 34	6, 7
Southern Railway Company v. Aluminum Company of America (R. 187)	6

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The Southwest Stone Company, appellant below in No. 13605, *Southwest Stone Company v. Missouri-Kansas-Texas Railroad Company*, prays that a writ of certiorari be issued to review the judgment entered in this case on November 30, 1951, by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The district court did not render an opinion. The opinion of the Court of Appeals (R. 170-175) is reported at *192 F. 2d 395.*

JURISDICTION

The Federal District Court had original jurisdiction because the controversy arose under an act of Congress regulating interstate commerce *(28 U. S. C. A. 1337)*. The Court of Appeals for the Fifth Circuit had jurisdiction of the appeal under *28 U. S. C. A. 1294 (1)*. This court has jurisdiction under *28 U. S. C. A. 1254*. This petition is filed within the time provided in *28 U. S. C. A. 2101 (c)*.

QUESTIONS PRESENTED

(a) May a railroad company charge a consignor demurrage on cars held on its storage tracks with the intention of later placing them in a position accessible for loading or at a point previously designated by the consignor?

(b) In a demurrage suit, where there is a dispute between the parties as to the point designated by the shipper for the placement of the cars, may the trial court receive carrier's evidence and reject the shipper's evidence on that point?

(c) In 1937 a shipper in writing designated a spot where all cars were to be placed for loading. The carrier in writing agreed that on all future orders it would be understood that this spot was designated. Thereafter the shipper

did not specify each time a car was ordered that it be placed at this precise spot. Is the Appellate Court justified in affirming a judgment for the carrier on the ground that the written agreement was irrelevant since the shipper failed to designate such spot each time a car was ordered?

(d) In 1923, a carrier entered into an arrangement with a shipper whereby the shipper would construct additional trackage near its plant, which the railroad would use as storage tracks. These tracks were for the use of the carrier. The arrangement contemplated that cars placed on these storage tracks would be under the control of the carrier and would not be considered cars furnished the shipper until cars were actually appropriated by the shipper. After the agreement had been in effect for thirty years the carrier began assessing demurrage on cars from the time same were placed on the storage tracks. Under such circumstances, is the trial court justified in rejecting evidence of the existence of such agreement and is the Appellate Court justified in affirming judgment for the carrier when such agreement was not permitted to be proved?

STATUTES AND REGULATIONS INVOLVED

Section 6 of the Interstate Commerce Act (49 U. S. C. A. 6) provides that railroads must assess charges in accordance with tariffs published and filed with the Interstate Commerce Commission. The pertinent provisions of the applicable freight tariff are shown in Appendix A herein.

STATEMENT

The Missouri-Kansas-Texas Railroad Company sued the Southwest Stone Company, a shipper of crushed stone, for demurrage accruing on empty cars while being held on railroad storage tracks constructed by both parties under an agreement made thirty years ago for the purpose of enabling the railroad company to supply cars needed by the stone company with less operating expense. None of the cars on which demurrage was claimed was placed in a position accessible for loading or at the place previously designated by the shipper for loading.

The case was tried to a jury. Railroad witnesses testified that the tracks on which the cars were placed were not "storage tracks" and that the cars had been placed for loading. The trial court rejected shipper evidence that the tracks were railroad storage tracks, that they had been constructed under a mutual agreement for the benefit of both parties, that they had been so used without question for nearly thirty years, and that none of the cars had been placed in a position accessible for loading or at a spot previously designated by shipper. The rejected evidence included written admissions by the railroad that the tracks on which the cars were placed were "storage tracks" and that the shipper had designated a point of placement other than that where the cars were held for storage.

The trial court charged the jury that the applicable freight tariff authorizes the railroad company to charge demurrage on cars placed "on a lead track, a track that

could be used for getting the car to the particular loading bin, just so it was amenable to the desires, and, intentions, and, purposes of the shipper."

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In holding that defendant alleged that no demurrage accrued after cars were placed at point designated.

2. In holding that appellant presented only two grounds for reversal.

3. In holding that the undisputed evidence shows that orders for cars were given orally.

4. In holding that letters tendered as defendant's exhibits 1, 2 and 4 had no relevancy in this proceeding.

5. In holding that the court's charge was not erroneous and was fair to appellant.

6. In affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT

Neither this court nor the Circuit Court for the Fifth Circuit has ever decided the precise questions of law involved in this proceeding, so far as we can find. The Circuit Court for the Ninth Circuit and a District Court in the Sixth Circuit have recently decided the precise questions directly contrary to the decision of the Fifth Circuit Court in this case.

In *Pacific Portland Cement Company v. Western Pacific Railroad, 184 F. (2) 34, Cert. denied 340 U. S. 906,* the Court of Appeals for the Ninth Circuit held that demurrage was not collectible. The facts were on all fours with the facts in this case. There the storage tracks were constructed and maintained by the shipper. Under an arrangement entered into in 1926, in order to relieve congestion in the railroad yards, shipper removed empty cars from railroad yards with its own switch engine and placed them on storage tracks belonging to shipper. The court held that demurrage time did not begin running until the cars were later "appropriated" for loading and moved from the storage tracks. The demurrage tariff applicable there was the same tariff as applicable in this case. The arrangement made in 1926 for the mutual benefit of the railroad and the shipper was considered of great importance.

In *Southern Railway Company v. Aluminum Company of America* (R. 187), not yet reported, a District Court in the Sixth Circuit held that demurrage was not collectible under facts very similar to those in the *Pacific Portland Cement Case.* There, also, the applicable demurrage tariff was the same tariff as applicable here. The Aluminum Company constructed on its own property and at its own expense adequate track facilities for the marshalling and sorting of cars preparatory to spotting them for loading and unloading. Those yards were used by the railroad as an assembly or storage yard. From 1921 to 1946 demurrage time was computed from the time the cars were

"appropriated" or removed from the storage tracks to be taken to loading points. Then the railroad changed its mind and tried to apply the tariff as applied by the M-K-T Railroad Company in this case. The court said the prior interpretation was correct. So far as we know, no appeal was taken in that case.

In *Southwest Stone Company v. Missouri-Kansas-Texas Railroad Company*, the case at bar, the circuit court for the Fifth Circuit held that the agreement entered into in 1923 under which both the railroad and the shipper constructed track facilities for marshalling and storing cars was irrevelant; that the designation of a point where cars were to be placed for unloading in accordance with Rule 3 was irrevelant; and that the admission in Defendant's Ex. 2 (R. 173) that the tracks on which the cars were stored, and where demurrage accrued, were "storage tracks "was irrelevant. It further held that the trial court's charge to the jury was not erroneous though the charge indicated that demurrage could be assessed on cars held in a railroad assembly or storage yard and even on a lead track. (R. 175.)

In the *Pacific Portland Cement Case* the railroad sued for more than $63,000. In the *Aluminum Company Case* the railroad sued for nearly $100,000. In this case suit was filed for less than $500. Only a few cars stored in three widely separated months were included. If the principle can be established on a few cars, suits for much larger sums will follow. Important questions of law and large sums of money are involved. If the Sixth and Ninth Cir-

cuit decisions are right, the Fifth Circuit decision is wrong. This court should settle the question for the benefit of the shippers throughout the United States.

SUMMARY OF FACTS HELD TO BE IRRELEVANT

Oral and documentary evidence showing the following facts was tendered and rejected by the trial court. The Circuit Court held that it has no relevancy in this case. (R. 175.)

In 1923 the railroad and the shipper at Stringtown, Okla., entered into an arrangement under which tracks shown on map at page 161 of the record were constructed for the mutual benefit of both parties. These tracks were to be used as storage tracks for cars preparatory for spotting and loading when required by shipper. They were so recognized in writing by the railroad. (R. 173.) In accordance with the provisions of Rule 3 of the applicable tariff, the shipper designated the point where these cars were to be placed for loading. (R. 77.) These tracks were constructed to prevent the railroad having to store excess cars at Atoka, Okla., eight miles distant from Stringtown, and move them up by local freight service each day.

As a condition precedent to the execution of the average agreement on which the railroad relied, it was agreed between the railroad and the shipper that the shipper had previously designated the loading bins as the point at which cars should be placed for loading and that demurrage time would be computed from the time that cars are so placed or "from the time you pull them off the storage

track and begin to load." See Defendant's Exhibits 1 and 2 (R. 77 and 79). It was understood between the parties that this agreement should be a part of the Average Agreement shown in Plaintiff's Exhibit 3 on page 41 of the record. The trial court accepted Plaintiff's Ex. 3 but rejected Defendant's Ex. 1 and 2.

For nearly thirty years the agreement shown in Defendant's Ex. 1 and 2 was followed in computing demurrage on cars held on the lead track and the four storage tracks shown on map at page 161 of the record. Demurrage time was computed from the time the cars were placed under the loading bins or from the time when cars were pulled from the storage tracks. In January, July and September, 1950, the railroad attempted to compute the time from the hour and date the cars were placed on the storage tracks and claimed that it had erred in the custom and practice followed from 1923 through 1949.

SUMMARY OF FACTS ADMITTED IN EVIDENCE

The Southwest Stone Company operates a stone quarry at Stringtown, Okla. (R. 118.) About 1920 that company negotiated a contract with the Missouri-Kansas-Texas Railroad Company with respect to constructing additional trackage (R. 120). Testimony as to details was not admitted. The present trackage arrangements are depicted on map reflected at page 161 of the record. The four tracks between the respective switches are called storage tracks and are used for storage by the railroad. (R. 122.)

Stringtown, Okla., is a small place. If the railroad has more cars than can be stored on the four storage tracks, they are held at Atoka, Okla., eight miles south of Stringtown (R. 131). There is one train a day from Atoka to Stringtown (R. 132). When the cars arrive at Stringtown, they are placed on the lead track to be cleaned by the section crew. Most of the time the local runs late and the section crew goes home before the cars are set out on the lead track. After cleaning, they are classified into five or six classes. (R. 132.)

After being placed on the storage tracks the cars are still considered the railroad's cars until they are dropped down under the bin for loading. (R. 133.) From time to time the railroad places cars on those storage tracks which the shipper is not permitted to load. Those cars are dropped through without loading and removed by the railroad for loading at other points. The cars placed on those storage tracks exceed the daily requirements of the shipper. (R. 134.) When eight cars of a certain type are needed, the railroad sometimes places twenty or thirty cars of that type on the storage tracks. (R. 135.) The railroad does not maintain a switch engine at Stringtown, Okla. (R. 136.) The Southwest Stone Company has twelve loading bins at Stringtown and it requires about five minutes to load a car from one of those bins. (R. 139.) Three cars can be loaded at one time (R. 143).

Quite often cars in excess of the number which the shipper expects to load are placed on the four storage tracks shown on map at page 161 of the record (R. 151). Some

of the cars are taken out by the railroad before they are loaded by the shipper. They come in and pull them off of the storage tracks. With the exception of T. & P. ballast cars, the local superintendent usually telephones the railroad agent how many cars he expects to load next day but the railroad frequently places more cars than that on the storage tracks. No information is ever furnished as to the number of T. & P. ballast cars that may be loaded (R. 151).

The length of the several tracks used by the railroad is shown below:

Lead Track	2,000 ft.
Track No. 1	1,403½ ft.
Track No. 2	3,694 ft.
Track No. 3	3,260½ ft.
Track No. 4	1,437.4 ft.

(R. 30 and 161.)

The loading bins (designated as the point of placement) are approximately 150 feet south of the storage tracks (R. 30).

Under the present emergency, the demurrage applicable on cars held for loading under the average agreement is as follows:

First day	$ 5.00 per car
Second day	5.00 per car
Third day	10.00 per car
Fourth day	10.00 per car
Each succeeding day	20.00 per car

Charges beyond the second day shall not be offset or reduced by accrued credits (R. 52).

Demurrage time on the cars involved herein was computed from the hour and date the cars were placed on Tracks 1, 2, 3 and 4 (R. 10-17 and 70).

While two witnesses for the railroad testified that cars were not placed on Tracks 1, 2, 3 and 4 until they had been ordered, *Witness Rich* admitted on cross examination that T. & P. ballast cars were never ordered and the first he knew about them was when they arrived at the station. *Witness Rich* was local agent for the railroad and he testified that he knew those cars had not been ordered (R. 104). Yet they were placed on Tracks 1, 2, 3 and 4 on arrival. (R. 71.)

Cars were first placed on the lead track and cleaned. They were then placed on Tracks 1, 2, 3 and 4. The M-K-T Railroad has no other storage track at Stringtown (R. 106). On occasions the shipper pulled cars off of the lead track with a Caterpillar tractor. (R. 108.) At other times more cars are placed on the lead track and Tracks 1, 2, 3 and 4 than the shipper indicated he expected to load. They remain on those tracks sometime before they are needed (R. 151).

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RALPH W. CURRIE,
FRANK A. LEFFINGWELL,
Attorneys for Petitioner.

Date: February 15, 1952.
Address: 1515 Praetorian Building,
Dallas 1, Texas.

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of this petition to Mr. O. O. Touchstone, attorney for the appellee, at his offices in the Southland Life Building, Dallas, Texas. I further certify that he has already been furnished with a copy of the transcript of record, a copy of the decision of November 30, 1951, by the Court of Appeals, a copy of appellant's motion for rehearing December 19, 1951, and a copy of the order of January 7, 1952, denying such rehearing.

Witness my hand this the 15th day of February, 1952.

.....

FRANK A. LEFFINGWELL,
Of Counsel.

APPENDIX A

Association of American Railroads Freight Tariff 4-Y, B. T. Jones' I. C. C. 3963, contains rates, rules and regulations providing for the computation and collection of demurrage on the cars in question. (R. 38).

The pertinent rules are as follows:

Rule 3, Section D, states:

> "Except as otherwise provided in Section B, Paragraph 1, of this rule, on cars to be delivered on other than public delivery tracks, time will be computed from the first 7:00 a.m. after actual or constructive placement on such tracks.
>
> "Time computed from actual placement on cars placed at exactly 7:00 a.m. will begin at the same 7:00 a.m.; actual placement to be determined by the precise time the engine cuts loose. (See Rule 4, Section C, page 43 of tariff, as amended, and Rule 5, page 44 of tariff, as amended, and Rule 6, page 44 of tariff, as amended.)
>
> " 'Actual placement' is made when a car is placed in an accessible position for loading or unloading or at a point previously designated by the consignor or consignee. If such placing is prevented from any cause attributable to consignor or consignee and car is placed on the private or other than public delivery tracks serving the consignor or consignee, it shall be considered constructively placed without notice." (R. 62-63.)

Rule 6, Section D, states:

> "If an empty car is appropriated without being ordered, it shall be considered as having been ordered and actually placed at the time so appropriated. If not loaded outbound, such car is subject to Section B of this rule." (R. 64.)

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v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *Respondent*

RESPONDENT'S REPLY BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Statement	2
Response to Specification of Errors	3
Reply to Reasons for Granting the Writ	4
Reply to Summary of Facts Held to be Irrelevant	6
Reply to Summary of Facts Admitted in Evidence	7
Conclusion	7-8
Certificate of Service	8

INDEX OF AUTHORITIES

Bers v. Erie R. Co., 225 N.Y. 543, 122 N.E. 457	5
Great Lakes Steel Corp. v. D.T. & L.R. Co., 26 N.W. (2d) 704, 317 Mich. 126	5
McDonald et al v. Chicago & N.W. Ry. Co., (Wis. - 1936), 266 N.W. 246, p. 249; 13 C.J.S. Carriers, Sec. 165, p. 324	5
Norfolk Tidewater Terminal v. N. & P.B.L.R. Co., (Va.) 195 S.E. 680, 170 Va. 118	5
Rice & Lockwood Lumber Co. v. Boston & M.R.R., 31 N.E. (2d) 219, p. 221, 309 Mass. 101	4

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MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *Respondent*

RESPONDENT'S REPLY BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States:

Respondent, Missouri-Kansas-Texas Railroad Company, respectfully submits that the action of the Court of Appeals, as reflected by its opinion in all things sustaining the verdict of the jury and the judgment of the trial court, is correct in that there exists no basis for the granting of a writ of certiorari. In reply to the petition for the writ, respondent respectfully shows unto the court the following:

STATEMENT

(In Reply to Petitioner's Statement, pp. 4-5 of the Petition)

The respondent respectfully challenges the statement of petitioner to the effect that none of the cars on which demurrage was claimed was placed in a position accessible for loading, because the verdict of the jury has in all things foreclosed this issue. The cause of action was a claim for demurrage upon a detention of 271 specific cars in the year 1950. The respondent as plaintiff in the trial court specifically identified each one of such cars by the number, the initial, the time ordered out by petitioner as defendant, and the date and time actually placed. Such statement further identified the track upon which each car was placed, which tracks were not public delivery tracks but were private sidings of appellant (R. 152). Such statement further itemized the days detained, the debit, credit, and charges (R. 10-18). Such statement was proved by competent legal evidence (R. 55-59).

The petitioner as defendant in the trial court admitted in its answer that it loaded and forwarded the several cars of freight specified on or about the time shown therein (R. 18). It attempted to combat the evidence as reflected by the statement of the several cars proved by respondent by offering in evidence an account of its own, in which account petitioner stated that 103 cars were ordered out at a different time and returned to respondent railroad at a different time (R. 157-160). This was the only

evidence by which the petitioner in any manner attempted to refute the specific charges upon the specific cars upon which demurrage was claimed. In this posture the trial court submitted the cause to the jury and upon such verdict of the jury judgment was rendered in favor of the respondent as plaintiff (R. 154-156). There is no evidence throughout the entire record that the actual cars involved were stored or placed on tracks designated 1, 2, 3, and 4 for the benefit of the respondent railroad, or at it utilized such private tracks for this purpose. As heretofore stated, such tracks 1, 2, 3, and 4 were to all intents and purposes the private sidings of the respondent. If there is any evidence in the record which would have sustained a jury finding to such an effect, then such question has been foreclosed by the verdict of the jury as a controverted fact issue (R. 107).

The rejected evidence was in no manner competent or relevant to this controversy, because it did not tend to prove that the cars in controversy were stored on the tracks by the respondent railroad.

RESPONSE TO SPECIFICATION OF ERRORS
(p. 5 of Petition)

Such specifications of errors in no manner present errors of substantive law which would require this court to overturn the verdict of a jury upon the controverted facts in issue, which facts were duly submitted to the jury upon appropriate instructions.

REPLY TO REASONS FOR GRANTING THE WRIT
(pp. 5-8 of the Petition)

The respondent respectfully submits that the cases cited by petitioner are in no degree apposite to the record in this cause. In this cause there is a verdict of a jury upon all controverted issues of fact. It was the contention of the petitioner that the railroad utilized these tracks for storage purposes. It attempted to prove this issue by evidence which respondent contends was nothing more than vague, glittering generalities (R. 150-151, R. 134). If respondent is incorrect and these generalities had the standing of probative evidence, then the jury has resolved the controverted facts against petitioner.

In each of the cases cited there was no jury verdict; in each of the cases cited the court held that the cars were stored prior to appropriation for use. No such facts are present in this cause and the inquiry was foreclosed by the jury verdict. The respondent was only bound to place the specific cars ordered out upon the private sidings of petitioner. For an apt statement of the rule, the court is referred to the following from the case of *Rice & Lockwood Lumber Co. v. Boston & M.R.R.*, 31 N.E. (2d) 219, p. 221, 309 Mass. 101:

> "* * * It is a matter of common knowledge that many industrial plants are equipped with side tracks for the reception and shipment of carloads of freight and that it is the general and universal practice of railroad corporations to deliver and accept cars upon

such sidings. New York Central & Hudson River Railroad v. General Electric Co., 219 N.Y. 227, 114 N.E. 115, 1 A.L.R. 1417, United States v. American Sheet & Tin Plate Co., 301 U.S. 402, 57 S. Ct. 804, 81 L. Ed. 1186. It has been held that a railroad corporation is required to deliver cars upon such a siding provided it is within its switching area or its terminal limits, and that transportation ends when cars are placed upon the siding. New York, New Haven & Hartford Railroad v. Porter, 220 Mass. 547, 108 N. E. 499; Batchelder & Snyder Co. v. Union Freight Railroad, 259 Mass. 368, 156 N.E. 698, 54 A.L.R. 616; Los Aangles Switching Case (Interstate Commerce Comm. v. Atchison, T. & S. F. R. Co.), 234 U.S. 294, 34 S. Ct. 814, 58 L. Ed. 1319; United States v. American Sheet & Tin Plate Co., 301 U.S. 402, 57 S. Ct. 804, 81 L. Ed. 1186; Banner Grain Co. v. Great Northern Railroad, 119 Minn. 68, 137 N.W. 161, 41 L.R.A., N.S., 678; New York Central & Hudson River Railroad v. General Electric Co., 219 N.Y. 227, 114 N.E. 115, 1 A.L.R. 1417; Lee v. Erie Railroad, 173 App. Div. 75, 158 N.Y.S. 730."

In addition to the authorities cited in such above case, attention is respectfully directed to the following, which hold that a railroad's duty is discharged when the car is placed upon the private siding of the shipper for loading: *McDonald et al v. Chicago & N.W. Ry. Co.*, (Wis. - 1936), 266 N.W. 246, p. 249; 13 C.J.S. Carriers, Sec. 165, p. 324; *Great Lakes Steel Corp. v. D. T. & L. R. Co.* 26 N.W. (2d) 704, 317 Mich. 126; *Norfolk Tidewater Terminal v. N. & P. B.L.R. Co.*, (Va.) 195 S. E. 680, 170 Va. 118; *Bers v. Erie R. Co.*, 225 N.Y. 543, 122 N.E. 457.

In the conclusion the respondent insists that the two cases cited on Page 6 of the petition are in no degree in conflict; that there could be no conflict because the jury has decided all controverted issues of fact, which verdict includes a finding that these specific cars were never stored on the private sidings of the petitioner for the benefit of the railroad. It likewise includes a finding that the railroad had never utilized such tracks for this purpose, contrary to the claim of petitioner.

REPLY TO SUMMARY OF FACTS HELD TO BE IRRELEVANT

(pp. 8-9 of Ptitioner)

The petitioner attempted to prove that the cars in controversy were stored on its private tracks by an attempted introduction of a letter written by agent of the railroad in 1923 and also a letter written on August 5, 1937 (R. 172-173). Both lower courts properly held that these letters could not have any relevancy to conditions existing in 1950. It further appeared as a matter of record that any understanding or any prior position assumed by the railroad had been abandoned at the time of this controversy, because the railroad was not using the tracks in controversy for storage purposes during the year 1950. Respondent respectfully insists that the letters were utterly irrelevant for the reasons stated in the opinion of the Court of Appeals.

REPLY TO SUMMARY OF FACTS ADMITTED IN EVIDENCE

(pp. 9-12 of the Petition)

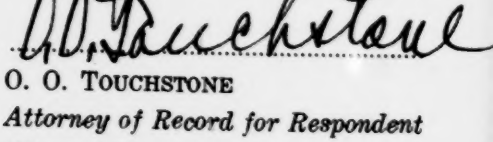
Any characterization of Tracks 1, 2, 3, and 4 as storage tracks is the appellation of the petitioner; petitioner's president called them storage tracks upon the trial (R. 113-132). Any testimony that the cars were still considered the railroad's cars after being placed on any of such tracks came from petitioner (R. 133). *There was no specific evidence with regard to the cars in controversy upon which the charges were made being stored upon any track for the benefit of the railroad.* If such appellation and such a construction by the petitioner reaches the dignity of probative evidence, then the jury has resolved such facts against petitioner. The entire summary of facts as presented by petitioner is nothing more than an attempt to secure a reweighing of the evidence; it is likewise nothing more than an attempt to prevail upon this court to set aside a jury verdict upon controverted facts contrary to the Seventh Amendment to the United States Constitution.

CONCLUSION

The respondent respectfully submits that no grounds are presented which would authorize the granting of a writ of certiorari in this cause and that the petition for a writ

should be in all things refused, and in duty bound respondent will ever pray.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the above and foregoing reply brief has been duly served upon the attorneys for petitioner, Messrs. Ralph W. Currie and Frank A. Leffingwell, whose address is 1515 Praetorian Building, Dallas, Texas, by delivery of a printed copy to such attorneys, in their office, prior to the mailing of the originals to the Clerk of the United States Supreme Court for filing.

O. O. Touchstone